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In the Supreme Court of the United States

OCTOBER TERM, 1968

VINCENT JOHN RAO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 319

VINCENT JOHN RAO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 394 F. 2d 354.

JURISDICTION

The judgment of the court of appeals was entered on May 9, 1968. A petition for rehearing was denied on June 5, 1968. Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari

to July 19, 1968, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether *Allen* v. *United States*, 164 U.S. 492, should be overruled.

2. Whether it was error for the trial judge to give an *Allen* charge after being made aware of the jury's inability to reach a verdict and of its numerical division.

3. Whether the language of the supplementary charge given the jury was proper.

4. Whether the evidence was sufficient to support petitioner's conviction for perjury.

STATEMENT

A five-count indictment returned in the United States District Court for the Southern District of New York charged petitioner with perjury, in violation of 18 U.S.C. 1621. After a jury trial on four of the counts,[1] petitioner was convicted on one, with the jury unable to agree as to the others. On December 28, 1967, petitioner was tentatively sentenced, pursuant to 18 U.S.C. 4208(b), to imprisonment for five years, and was committed to the custody of the

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[1] Count 4, charging perjury with reference to statements made by petitioner regarding his trip to Appalachin, New York, in November 1957, was severed (Tr. 398).

Attorney General.[2] The court of appeals affirmed the conviction (Pet. App. A).

1. The evidence pertinent to the count upon which petitioner was convicted (Count 5) showed that in February 1964, a grand jury was convened in the Southern District of New York to investigate the activities of individuals believed to be participants in organized crime and narcotics traffic. Petitioner was subpoenaed to appear before the grand jury, and was granted immunity from prosecution under the provisions of 18 U.S.C. 1406 (Tr. 3, 451-452). Thereafter, he testified on four occasions, the last occurring on March 15, 1965 (Tr. 454). On that date petitioner was asked about his familiarity with Trenchie's Restaurant. He stated that he went to Trenchie's "periodically" (Tr. 289), but did not know who was the owner (Tr. 290). When asked how often he had been there within the past two weeks, petitioner replied, "I don't know. Four or five times, six times, I don't know" (Tr. 291). On further questioning, petitioner said that he could not "pinpoint" the number of times he had been to Trenchie's any more than "periodically" (Tr. 293). He stated that his reason for going there was to eat, and that practically every time he went to Trenchie's his wife accompanied him (Tr. 293-294). Throughout the inquiry petitioner

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[2] As petitioner correctly points out (Pet. 3), Section 4208 (b) provides that, if the district judge "desires more detailed information as a basis for determining the sentence to be imposed," the convicted defendant is to be given the maximum sentence prescribed for the offense involved, pending receipt of the results of a study and recommendations from the Director of the Bureau of Prisons, after which he is resentenced.

denied owning the restaurant or knowing the identity of the owner (Tr. 291-294).

Two days later an indictment was returned charging that petitioner's testimony was false in that he had been in the restaurant every evening but one for the two prior weeks. At trial, Agents Dugan and Belmont testified that each evening during the pertinent two-week period they had conducted a physical surveillance of Trenchie's. They saw petitioner there every night but one, Thursday, March 11. During their observations petitioner was usually alone and was never accompanied by a woman identified as his wife. He never ate, and was seen drinking once. On that occasion he was not observed to have paid for the drinks (Tr. 340). He spent most of the time sitting at a front table in the restaurant or in a chair in the lobby. When he sat at a table there were never any dishes or glasses in front of him. At times when he sat in the lobby he would greet customers. He also was seen conversing with the floor manager and the apparent owner, Trenchie, as well as with the employees and entertainers. During the period of the surveillance petitioner was seen at Trenchie's as early as 8 p.m., and as late as 1:30 a.m. (Tr. 298-311, 329-343).

2. Petitioner's perjury trial began on November 6, 1967. After seven trial days, the case was submitted to the jury at 3:05 p.m. on November 16, 1967 (Tr. 693). The jury deliberated until 7 p.m., and recessed until 8:15. At 10:10 the court read to counsel a note from the jury, written at 9:55, which stated: "We the jury cannot reach a unanimous de-

cision—ratio of nine to three on all counts" (Tr. 713). A request by government counsel to give an *Allen* charge was deferred until the next morning. At 10:35 p.m. the court sent the jurors home. The following day deliberations commenced at 10:10 a.m. At 11:50 a.m., the court received another note which said: "We cannot agree on a verdict—we are deadlocked" (Tr. 722). The jury was then recalled to the courtroom and received a version of the *Allen* charge. Later that afternoon the jury sent a note asking if it was allowable to reach a verdict on one count and be divided on the others. The court replied affirmatively (Tr. 737). At 3:30 p.m., the jury announced that it had found petitioner guilty on Count 5 (Tr. 741-742).

ARGUMENT

1. Petitioner makes an extensive, broadside attack on the *Allen* charge procedure as a whole (Pet. 15-17). Considering that the procedure has been upheld over and again by the courts, that some form of the *Allen* charge is sanctioned in every circuit, and that this Court has repeatedly refused to reconsider or overrule *Allen*,[3] petitioner bears a heavy burden. No reason is suggested why now is an appropriate time, or this a suitable case, for undertaking a reexamination of the *Allen* decision. Petitioner's suggestions that *Allen* is premised on "little more than a judicial longing for termination of litigation" (Pet. 15), and

[3] In this regard, see, *e.g.*, the cases cited by the court of appeals (Pet. App. A, 3a, n. 2).

that "analysis will inevitably lead to abandoning the charge" (Pet. 16), are not persuasive. Petitioner would apparently seek to establish a requirement that in all cases a mistrial must be declared immediately when a jury reports an inability to reach a verdict. But, as stated in *Allen* itself, "The very object of the jury system is to secure unanimity by a comparison of views * * *" (164 U.S. at 501). In view of the requirement of unanimity in jury verdicts, an automatic rule requiring the declaration of a mistrial whenever a deadlock was reported would be productive of nothing but unnecessary chaos in the administration of criminal justice in the federal courts. Individuals do differ in the manner and the time in which they reach final determinations. *Allen* only reflects those characteristics of human behavior (see *id.* at 501-502). So long as the instructions given cannot be said to be coercive in effect (compare *Jenkins* v. *United States*, 380 U.S. 445, 446), a charge based on the *Allen* case simply ensures that the jurors have a proper understanding of the nature of their deliberative process. Moreover, it is wholly unclear that the approach for which petitioner apparently contends would necessarily result in more acquittals, which is presumably what petitioner seeks.

2. Relying on *Brasfield* v. *United States*, 272 U.S. 448, petitioner further claims (Pet. 19-20) that the trial judge erred in giving a version of the *Allen* charge after learning that the jury was divided nine to three. However, *Brasfield* and its predecessor, *Burton* v. *United States*, 196 U.S. 283, 307, condemned the practice of court inquiry into the numeri-

cal division of a deadlocked jury. As this Court said in *Brasfield*, 272 U.S. at 450, "We deem it essential to the fair and impartial conduct of the trial, that the inquiry itself should be regarded as ground for reversal." Here the court made no inquiry, but received a note from the jury—limited to the fact that the jury was divided nine to three, without any indication of whether the majority favored guilt or acquittal. There is no reason why this unsolicited information should forever preclude the giving of an appropriate further charge. See *Bowen* v. *United States*, 153 F. 2d 747 (C.A. 8), certiorari denied, 328 U.S. 835.

Moreover, the *Allen* charge was not given here at the time the court was made aware of the exact division of the jury. The numerical split was divulged on the evening of November 16. Shortly thereafter the jury retired for the night, and resumed its deliberations at 10 a.m. the following day. Only after receiving a second note from the jury, at 11:30 a.m., did the court elect to give its *Allen* charge. The second note did not disclose the jury's division, and there is no reason to believe that, after more than an hour's deliberation, the division remained constant. The fact that the jury was advised by the court before being sent home for the evening that the next day it would, if necessary, receive a charge dealing with agreement upon a verdict can hardly be viewed as of consequence in this regard.[4]

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[4] *Williams* v. *United States*, 338 F. 2d 530 (C.A.D.C.), cited by petitioner as holding contrary to the decision below here (Pet. 19), is clearly distinguishable. In *Williams* the dead-

3. Petitioner also argues that the language of the charge given to the jury improperly exceeded the bounds approved in *Allen* v. *United States*, 164 U.S. 492, 501 (Pet. 9-15, 17-19). Although the charge given is not precisely the same as that in *Allen*, we submit that, read in its entirety rather than in the piecemeal way developed in the instant petition for certiorari, the charge was not coercive.

a. In giving the instruction, the trial judge was not dogmatic in his approach. He began by indicating that he had no intent to coerce the jury to come to an agreement, and that, in the end, each juror had to follow his own conscience. He did say that every juror must make an honest endeavor to see the views of the other members, to keep his mind "absolutely open," and to give careful thought to what the majority believed to be the proper result. But he was careful to point out that he did not mean to suggest that a juror who, after being receptive to the views of others, "is absolutely convinced that the majority is wrong, that he or she has not the right to abide by his or her own judgment." He noted that jurors in a minority, or even if there was an equal division,

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locked jury sent the court a note asking whether two alternate jurors might be substituted for the minority voters. During the colloquy immediately following the receipt of the note the trial judge in open court was told by the foreman that there was a "clear minority" causing the deadlock. An *Allen* charge was given, obviously directed to the two members of the minority. Judge Wright, speaking for the majority of the court of appeals panel, stated that the jury's disclosure "and, under the circumstances, the trial court's repeated reference to the 'clear minority' on the jury was at least as coercive as the colloquy condemned in *Brasfield*" (338 F. 2d at 532, 533).

ought to be sufficiently humble to consider whether those of the opposite view had not reached the sounder conclusion (see Pet. App. B, where the whole of the supplementary charge is set out).

Contrary to petitioner's contention (Pet. 9), this supplementary charge had no effect upon the burden of proof. The term "absolutely convinced that the majority is wrong" serves only to tell a juror who still adheres to his position after hearing the point of view of others who have disagreed [5] that he ought not to surrender his views merely for the sake of unity. Considered in context (see Pet. App. A, 4a), the instruction could not possibly have been interpreted by any juror as conflicting with the court's explicit and unchallenged instructions on reasonable doubt and burden of proof.

b. Following the request that the jurors maintain an open mind, the trial judge discussed the time and expense incurred in the trial, stating that the law required a retrial unless the jury is unanimous, and that there was no reason to believe that any future jury would be more intelligent, impartial, or competent. Continuing, the court said (Tr. 725-726):

> The only reason I mentioned this is that some of these considerations may have escaped your attention because you have been fully occupied up to this time in reviewing the evidence. These are matters which, along with other perhaps more obvious ones, remind us how important and de-

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[5] Petitioner's discussion assumes that the majority favored conviction. The instruction, however, made no such assumption.

> sirable it is that you unanimously agree on a verdict of guilty or not guilty, if you can do so without abandoning your individual judgment and violating your conscience.

While it is true that the statement that a retrial was *required* if the jury could not agree is technically incorrect, it is difficult to perceive how this was harmful to petitioner. Supplemental instructions containing similar language have been approved by the courts. See, *e.g.*, *United States* v. *White*, 382 F. 2d 445 (C.A. 7), certiorari denied, 389 U.S. 1052; *Thaggard* v. *United States*, 354 F. 2d 735 (C.A. 5), certiorari denied, 383 U.S. 958; *Mills* v. *Tinsley*, 314 F.2d 311 (C.A. 10), certiorari denied, 374 U.S. 847; *Fulwood* v. *United States*, 369 F. 2d 960 (C.A.D.C.), certiorari denied, 387 U.S. 934; *United States* v. *Barnhill*, 305 F. 2d 164 (C.A. 6), certiorari denied, 371 U.S. 865. There is nothing inherently coercive in such a statement.* To the contrary, the jury's awareness that the case would have to be retried before a new jury could well serve to reduce any feeling of pressure to achieve a unanimous verdict.

c. Having advised the jury that, in the court's opinion, the case had been well tried, the trial judge then instructed that if the jurors were convinced that

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* As the court of appeals noted, there is nothing improper about an instruction referring to "[t]he considerable costs in money and time to both sides if a retrial is necessary" (Pet. App. A, 3a). Fairly considered in context, that is all the challenged language in this part of the charge conveyed to the jurors. It hardly did away with the requirement that their decision be based on the evidence, as petitioner asserts (Pet. 11-12).

they had reviewed the case from all possible angles and that further consideration would be hopeless, he would have to accept the inevitable and declare a mistrial. However, he further stated, if, after this supplementary instruction,

> * * * you think there is a chance that you are not so hopelessly divided or evenly divided and that you think there is a chance that a minority might be willing again to weigh the points of difference between you in the light of the views of the majority * * * I should want you to continue your deliberations. [Tr. 727.]

If the greater number of votes are for conviction, the judge said, a dissenting juror should consider whether his doubts are reasonable ones in view of their lack of impact upon the minds of so many others equally as honest and intelligent as himself. If, on the other hand, he continued, the majority are for acquittal, the minority should ask themselves whether they might not reasonably doubt the correctness of their judgment. Following an admonition that jurors should listen with deference to the arguments of others and should not enter the jury room with a blind determination that the verdict should represent his opinion of the case or close his ears to the arguments of fellow jurors, the judge concluded by repeating that he had no desire to coerce any juror to decide the case against his own judgment or to abandon personal convictions.

The source of this portion of the court's supplementary charge is the *Allen* case itself. First sanctioned there, such a charge has been subsequently approved by this Court on at least several occasions.

Kawakita v. *United States*, 343 U.S. 717, 744, affirming 190 F. 2d 506 (C.A. 9);[1] *Lias* v. *United States*, 284 U.S. 584, affirming 51 F. 2d 215 (C.A. 4). Its reference to what the minority of the jurors should do did not serve as a requirement that the jurors siding with the majority remain fixed in their position. Such a strained interpretation has no basis in the record and ignores the tenor of the charge in its entirety. When read with the other portions of the *Allen* charge, this part of the instruction merely presented a guideline for deliberations. Moreover, *all* of the jurors were admonished to examine their position "with candor and proper regard and deference to the opinions of others" (Tr. 727).

Finally, if petitioner at trial had believed that the majority of the jurors would interpret the charge as requiring them to maintain their position, he should have requested additional clarifying instructions. This he did not do; indeed, he did not even specifically object to this portion of the charge. His challenge now to this part of the charge is evidently an afterthought.

4. Despite petitioner's protestations to the contrary (Pet. 21-24), the evidence of guilt here was abundant. The grand jury, summoned to investigate certain alleged criminal activities, deemed it important to ascertain petitioner's interest, if any, in Trenchie's Res-

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[1] The use of a version of the *Allen* charge in *Kawakita* was one of the alleged errors urged upon this Court as a ground for reversal. In disposing of this contention, the Court grouped it with others which were termed "either insubstantial or so adequately disposed of by the Court of Appeals that we give them no notice" (343 U.S. at 744).

taurant. If petitioner had acknowledged that he was a daily visitor, further inquiry into the circumstances of and occasions for his presence on such a frequent basis would have been in order. Clearly, petitioner's testimony before the grand jury, that in the two-week period prior to testifying, he had been to Trenchie's only "periodically", and for the purpose of dining, usually with his wife, was intended to conceal the actual nature of his interest in the restaurant. The government's undisputed evidence at trial showed that petitioner had gone to Trenchie's on 13 days within the two-week period preceding his testimony; that his visits there were for extended periods of time; that his wife did not accompany him; that he was more than a mere diner; and that he conducted himself in a manner consistent with proprietorship. From this evidence the jury could properly reject any claim of faulty memory, and justifiably conclude that petitioner intentionally and wilfully lied to the grand jury.[8]

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[8] That petitioner had been granted immunity in testifying before the grand jury (see Pet. 8, 23, 24) hardly negates any and all motives he might have had not to reveal the nature of his interest in Trenchie's (see, *e.g.*, Pet. 22), or renders him immune from a perjury prosecution where it can be shown that he deliberately failed to tell the truth. Indeed, 18 U.S.C. 1406, pursuant to which petitioner was given immunity, expressly provides that "[n]o witness shall be exempt * * * from prosecution for perjury * * * committed while giving testimony * * * under compulsion as provided in this section."

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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